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No. 88-2093

In The

Supreme Court of the United States

October Term, 1988

RICHARDSON ENGINEERING COMPANY,

Petitioner,

vs.

WILLIAM L. CROW CONSTRUCTION COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITIONER'S BRIEF IN REPLY

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PETITIONER'S BRIEF IN REPLY

I. RECO'S PETITION FOR A WRIT OF CERTIORARI IS MERITORIOUS.

Only with difficulty, if then, is it possible to take "seriously" the Responsive Brief of William L. Crow Construction Company ("Crow"). To suggest to this Court, as Crow's Responsive Brief has done, that this controversy arises from a "garden-variety contract dispute" is ludicrous, especially since Crow's attorneys were awarded fees in the amount of $1,247,098.20 justified by the Court of Appeals because of the "complex" nature of a $10,000,000 contract claim. (Pet. App. 5a) (Parenthetically,

Crow's recovery against Richardson Engineering Company ("RECO") was for $546,357 – less than one half of the attorneys' fees awarded.)

Even more ludicrous is Crow's assertion that this matter only involves "pedestrian procedural questions". RECO's petition is clearly exemplary of what can and does happen when, in the haste to view matters through the "prism of the substantive evidentiary burden" of a non-moving party, the Trial Court fails to apply the basic principles for denying summary judgment and assumes the function of a jury, unwell and unwisely. *See Donahue v. Windsor Locks Board of Fire Commissioners*, 834 F.2d 54 (2nd Cir. 1987) at p. 57. In the instant matter, from the material facts found by the Trial Court, inferences arose which required that Court deny Crow's motion for summary judgment.

Although irrelevant to whether or not the Court grants RECO's Petition, Crow, in its preliminary statement, presents a series of half-truths and unproven assertions which blatantly intend to discredit RECO and to deflect this Court's attention from the real and substantial legal issues raised herein.

One of the more outrageous of such statements is that RECO was insolvent prior to contract and somehow misled Crow regarding its financial condition. The fact is, the full story is that the jury found that RECO did not fail when required "to supply reasonably accurate and current financial statements" to Crow. (Pet. App. 16a) Further, the jury found to be accurate the financial statements given to Crow prior to the commencement of

the Burlington Project which showed cash on hand of $1,000,000.

More outrageous still is the allegation that, somehow, RECO and Harry A. Richardson, Jr. as President of RECO, together or singularly, masterminded a check-kiting scheme. The fact is, the full story is that no criminal charges were ever brought against either RECO or Harry A. Richardson, Jr. The jury, after hearing Crow's allegations of financial irregularities between RECO and Harry A. Richardson, Jr., dismissed those allegations and returned a verdict for Harry A. Richardson, Jr. and against Crow. (Pet. App. 8a)

An example of half-truths is that Harry A. Richardson, Jr. obtained an interest-free loan from RECO in the amount of $471,000 in 1980. The facts of the matter are that over $300,000 of the amount was borrowed in 1974 and that Harry A. Richardson, Jr. and his wife used all of their personal assets to guarantee bank loans to fund the Crow project.

Another example is that RECO received from Crow $900,811 more than it spent on the job. In fact, that number was derived from Crow's damage witness Penny Cobb, who, admittedly, did not include any amount for RECO's direct or indirect overhead costs. When those costs are added, as they ought to be, as testified by Crow's former comptroller, RECO's expenses and payments far exceeded its billings and collections.

Most critically, RECO did not seek an advance of $1,000,000 from Crow. Rather, on January 2, 1981 RECO sought from Crow monies owed under the contract for contract requisitions, authorized change order work,

retainage, and acceleration costs which totaled well over $2,000,000. Most then, if not all, of RECO's cash flow and financial problems were attributable to Crow.

The undisputed testimony at depositions and trial by Harry A. Richardson, Jr. and Dan Camporale, Crow's former Comptroller, was that International Business Machines ("IBM") was wire transferring funds to Crow in trust for RECO of approximately $500,000 every two weeks. These funds were for work certified by Crow and the architect-engineers that RECO had satisfactorily completed on the job. The records of Crow's Bank, Morgan Guaranty Trust Co. ("Morgan"), as produced in discovery, confirmed that Crow then diverted each payment by wire transferring it to its parent company, J.A. Jones ("Jones") in North Carolina. Ken Alderman, Jones' financial representative, testified that the purpose of such account manipulation was to invest the funds when interest rates were running upwards of twenty (20%) percent in the 1980 financial crunch. As shown by Morgan's records, Crow would then issue checks to RECO on its New York City Bank account which was overdrawn to the extent of $1,000,000 on an almost daily basis.

When RECO sought to get Crow's checks certified or the funds wire transferred to RECO at the request of its bank, it could not. Mr. Richardson's undisputed testimony at depositions and at trial was that Crow's bank, Morgan, bounced Crow's checks back to RECO. This pattern and practice created cash flow problems for RECO, including causing several weeks of RECO's payroll checks to be returned for uncollected funds. RECO then placed sufficient cash in Vermont banks so that its employees could cash their checks without knowledge of

the problem or be impacted by the problem. (The bounced checks referred to by Crow in its preliminary statement was a direct result of Crow's check first bouncing.)

Aggravating the cash flow problem, it was Mr. Richardson's undisputed testimony that Crow ordered RECO to purchase and deliver hundreds of thousands of dollars of materials to the job, then put a "hold" on the work and refused to pay RECO for the material since it became "stored". Crow failed and refused to issue change orders and pay RECO for authorized work completed at Crow's oral and written directions. Crow regularly cut RECO's approved requisitions and failed to pay RECO for materials and labor expended for accelerations and premium time. Crow did, however, collect for itself those costs from IBM when it terminated RECO, after RECO had completed 92% of the base contract work as found by the jury (Pet. App. 6a(d)) and this was at a time when, unlike other subcontractors, there was not one complaint about RECO's performance and the quality of work performed as recorded in Crow's own job minutes.

A. Summary Judgment Ought Not To Have Been Granted.

There are times when silence does speak volumes. Nowhere in its Brief does Respondent Crow address, in any fashion, your Petitioner's major argument that the Trial Court and the Court of Appeals erred in granting Crow's motion for partial summary judgment.

RECO, your Petitioner, relying upon *Celotex Corporation v. Myrtle Nell Catrett*, 477 U.S. 317 (1986), *Anderson v.*

Liberty Lobby, Inc., 477 U.S. 242 (1986), *Wyler v. United States*, 725 F.2d 1956 (2d Cir. 1983) and *Donahue v. Windsor Locks Board of Fire Commissioners*, 834 F.2d 54 (2d Cir. 1987) argued that, from the material facts found by the Trial Court, inferences could easily and reasonably be drawn to conclude that Crow, not RECO, first breached their contract by wrongfully denying time extensions, resulting in RECO's claims for acceleration, disruption and interference damages. The denial of time extensions, under well established case law, nullifies the "no damage for delay" clause contained in RECO's contract with Crow. *United States Steel Corp. v. Missouri-Pacific R.R. Co.*, 668 F.2d 435 (3d Cir. 1982), cert. denied, 459 U.S. 836 (1982); *U.S. Industries v. Blake Construction Company*, 671 F.2d 529 (D.C. Cir. 1982); *Blake Construction Co. v. C.J. Coakley Co.*, 431 A.2d 569 (D.C. Aff. 1981); *Northeast Clackamas C.E. Co-Op v. Continental Casualty Co.*, 221 F.2d 329 (9th Cir. 1955). RECO's evidentiary burden to establish that fact, no matter the color, design or dimension of the prism used by the Trial Court, was neither burdensome nor heavy and was easily met from Crow's own records, answers to Interrogatories and the deposition of the now-deceased Fred Bethell (Crow's Construction Manager), as well as the testimony of Harry A. Richardson, Jr. and Art Warden (RECO's Project Manager). Crow's response, at the time of the motion for partial summary judgment, admitted refusal to give time extensions, more tongue in cheek than factual, was that it was merely encouraging RECO to complete performance. (RECO's claim from Crow's breach totaled $4,925,613.)

By its failure to respond to RECO's legal argument and factual analysis, it can only be concluded that Crow

concedes that both the Trial Court and the Court of Appeals did not properly apply the basic and governing principles applicable to motions made pursuant to Rule 56 of the Federal Rules of Civil Procedure by either not drawing all inferences against the moving party or not recognizing that there was a controversy regarding the inferences to be drawn from the material facts, or both.

It is also noteworthy that Crow does not seriously contest that the affidavit of Harry A. Richardson, Jr. was improperly excluded. Crow does not deny that it was based upon first-hand knowledge of events Mr. Richardson experienced and on meetings and conversations that he had as President of RECO. Rather, Crow suggests, but does not seriously argue, that somehow the substantive law controlling the controversy makes the affidavit somehow unimportant. In fact, the Trial Court adopted RECO's analysis as to the controlling substantive legal principles rather than Crow's.

However, at the time of Crow's motion for partial summary judgment, what the Trial Court did and the Court of Appeals erroneously approved, was to usurp the function of the jury by weighing the evidence and determining the truth of the matter, contrary to this Court's admonition in *Anderson, supra* at p. 249. When the jury was permitted to consider those same facts contained in Mr. Richardson's affidavit, the jury found that Crow agreed to pay RECO additional money at the end of the job to compensate RECO for the costs of accelerating change order work. (Pet. App. 18a) Obviously, such a finding only could have been possible if the Jury also found that Crow refused to grant time extensions and was convinced of Mr. Richardson's credibility.

B. The Decisions Below Excluding RECO's Expert's Testimony Are In Conflict With *U.S. Industries v. Blake*

The basis of the Trial Court's decision to exclude the testimony of RECO's expert as speculative was that "proof of causation was lacking regarding the accelerated costs". (Pet. App. 5a) It is precisely that requirement of causation which brings about a conflict between the decisions below and the holding in *U.S. Industries v. Blake Construction Company*, 671 F.2d 529 (D.C. Cir. 1982).

Rather than to address RECO's argument that the Trial Court below and the Court of Appeals failed to distinguish between acceleration and delay, thereby creating a conflict between *U.S. Industries* and the decisions below, Crow merely cites *City of New York v. Pullman, Inc.*, 662 F.2d 910 (2d Cir. 1981) cert. denied, 454 U.S. 1164 (1982). Again, silence speaks volumes.

Only if RECO's claim was for "delay damages", then and only then would RECO be required to show that its increased costs were caused by delay. In the instant matter, the jury found that Crow breached its oral contract to pay RECO additional money for the costs of accelerating change order work. Once that finding was made, RECO's only burden was to establish the degree of diminished productivity occasioned by being required to do additional work within a limited time period. RECO's expert used the same methodology that he used and was approved in *U.S. Industries, supra.;* that is, comparing labor costs before and after RECO was required to do the accelerated work for the change order work. However, he was not allowed to testify. Had he been allowed to testify,

he would have testified to damage claims for acceleration on change order work in an amount slightly in excess of $600,000.

II. CONCLUSION

The questions raised are substantial and of serious importance requiring this Court to amplify its standards for motions for summary judgment found in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986) and *Celotex Corporation v. Myrtle Nell Catrett*, 477 U.S. 317 (1986).

Respectfully Submitted,

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